

Direct Democracy and Constitutional Change: Institutional Learning from State Laboratories in the USA

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Although the federal constitutional amendment procedure in Article V of the U.S. Constitution has not been altered since its adoption 226 years ago, constitutional tradition in the 50 states has substantially evolved. For instance, popular referenda were unknown in 1787, but are now ubiquitous in state constitutionalism. Over time, a strong tradition of direct democracy and majoritarian voting rules has emerged in almost all states. Nevertheless, scholars have often neglected the rich source of state experiments with amendment procedures in the U.S. and usually only refer to Switzerland as the prime example of direct democracy and (constitutional) referenda.

According to [Article V](#) of the U.S. Constitution, the federal amendment procedure can be initiated via the federal or state legislative level. Either a two-thirds vote of both Houses of Congress is necessary to propose an amendment or two-thirds of the state legislatures can oblige Congress to call a special convention to propose amendments. Hitherto, not a single constitutional amendment has been adopted via a proposing convention.[1] In the second stage, the proposed amendment needs to be ratified by three-quarters of the states for approval. Congress may decide whether the states can act through their legislatures or via special ratifying conventions.

An analysis of these paths to constitutional amendment in Article V of the U.S. Constitution leads to the following remarkable observations:

1. In practice, calling a national proposing convention does not seem to be a preferred or feasible option for the states, so that the required two-thirds vote of Congress in the proposing phase always constitutes a federal veto power. Consequently, it is unlikely to pass amendments limiting the power of Congress or increasing the power of the state level.[2]
2. The equal representation of states in the Senate gives a disproportional amount of power to small states in the proposing stage.
3. The thirteen least populous states – together only representing approximately 4.4%[3] of the national population – can block every amendment in the ratification stage.
4. Last but not least, Article V **only involves legislatures and does not provide any form of direct democracy**, such as initiative petitions or referenda.

It follows from the last observation that the current amendment process of Article V clearly champions federalism over direct involvement of the People. Article V is still reminiscent of the initial fear of Southern slavocratic leaders for a popular vote.[4] In addition, in 1787 there were no useful examples at the state level which incorporated a detailed amendment process including direct involvement of the People. Nevertheless, based on the principle of popular sovereignty and a non-exclusive reading of Article V[5] one could argue that the People have

an *inalienable right to alter or abolish* the Constitution which they, themselves, have ordained and established.[6] According to [Akhil R. Amar](#) for instance, Article V does indeed not constrain the inalienable right of the People itself to alter the Constitution via a national referendum.[7]

There have been almost 150 state constitutions in the U.S., and they have been amended approximately [12,000 times](#). [8] In contrast to the onerous federal amendment procedure[9], the tradition in the states is thus clearly more flexible[10], though maybe too flexible. Moreover, this tradition is characterized by direct democracy and majoritarian voting rules:

- All states, except Delaware[11], require a popular vote after the *proposal of constitutional amendments by the state legislature*. Only Florida (a three-fifths supermajority or two-thirds for a new State tax or fee)[12], New Hampshire (a two-thirds supermajority)[13] and Illinois (a simple majority or three-fifths)[14] depart from the state tradition of majoritarian voting rules for constitutional referenda.
- In eighteen states, voters can also themselves initiate a proposal to amend the constitution via *petitioning*. [15] Once the percentage or number of voters required to sign the petition has been achieved, the proposed amendment is put on the ballot for ratification. In thirteen states a simple majority of the voters is sufficient.[16] Moreover, three states require a certain percentage of votes cast in the election in addition to a simple majority voting yes on the particular amendment.[17] Only Florida[18] and Illinois[19] require a supermajority (of 60% voting on the proposed amendment). Nevertheless, in several states the requirements for this form of direct democracy are so strict that it has only been successfully used in a few cases. Especially in Illinois, Massachusetts and Mississippi the gates to popular initiative have traditionally been extremely difficult to open. Over time, requirements have also been made substantially more stringent in Florida, Montana, Nebraska, Nevada, Oklahoma, and Oregon.
- 24 out of the 40 states in which the constitution explicitly provides how a proposing *constitutional convention* can be called explicitly require a simple majority vote for ratification of proposed amendments[20], two states require a 60% vote[21], and New Hampshire requires a two-thirds vote. The other thirteen state constitutions do not explicitly prescribe which majority of the voters is required.[22]

States may serve as laboratories, undertaking experiments that can yield useful insights about their successes and failures (so-called ‘institutional learning’ or ‘laboratory federalism’[23]). In order to develop potential alterations to the federal amendment procedure in Article V, it is useful – though often neglected – to look at the tradition of state constitutionalism. This tradition could be an important argument in favor of adding more direct democracy via initiative petitions[24] and ratifying referenda[25], thereby giving the Constitution back to the People.

[Akhil R. Amar](#) has vigorously defended the right of a simple majority of the People to alter the constitution.[26] Although he admits that this idea may scare some people[27], it should be mentioned that many U.S. citizens are already subjected to a majoritarian voting rule for amendments to their state constitution. Moreover, one state is more likely to become dominated by a majoritarian view, as opposed to the “safety in numbers” on the federal level.[28] Finally, one should realize that not only a tyranny of a majority, but also a tyranny of a minority can arise, which could block positive and reasonable reforms favored by a

strong majority. Obviously, (judicial) safeguards should be developed in order to ensure essential human rights and international obligations at all time.

[Bruce Ackerman](#) has also argued to explicitly amend Article V of the U.S. Constitution in order to introduce the option of a national referendum. He proposed the following amendment process: a President in his/her second term may propose amendments to the U.S. Congress; then, if two-thirds of both Houses approve the proposal, it requires 60% of the voters in two successive Presidential elections to ratify the amendment.[29] Deliberation is important and one should not be able to change the constitution overnight. Nevertheless, the particular procedure for this ‘constitutional moment of higher lawmaking’ is too onerous, especially in light of the existing constitutional tradition in the states and the problem of gridlock on the federal level.

With regard to the counterargument of federalism, I disagree with [Henry Monaghan](#) that federalism and the role of the states – as *inter alia* embedded in James Madison’s notable quote in Federalist No. 39 that “[the Constitution is] neither wholly *national* nor wholly *federal*”[30] – should exclude direct democracy via national referenda.[31] Of course, I recognize that one should not neglect the federal structure of the U.S. and consequently impose a territorial distribution across the states.

Moreover, I believe that one does not have to make a choice between representative and direct democracy. Both are compatible and could even strengthen each other. Undoubtedly, it is time to revive this important debate.

[1] Michael B. Rappaport, *Reforming Article V : The Problems Created by the National Convention Method & How to Fix Them*, 96 Va. L. Rev. 1509, 1512-1513 (2010) (invoking the uncertainty of a runaway Convention in order to explain why states find it unattractive to call a national proposing convention).

[2] Michael B. Rappaport, *Reforming Article V : The Problems Created by the National Convention Method & How to Fix Them*, 96 Va. L. Rev. 1509, 1511-1513 (2010).

[3] According to the [census of 2010](#), the thirteen states with the smallest population number (Wyoming, Vermont, North Dakota, Alaska, South Dakota, Delaware, Montana, Rhode Island, New Hampshire, Maine, Hawaii, Idaho, Nebraska) together have 13,725,340 citizens, which approximately represents 4.44 % of the total U.S. population (308,745,538). See Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. Mich. J.L. Reform, 409 (1987) (denouncing the three-fourths ratification requirement and noting how population changes *de facto* altered the amendment process of Article V).

[4] *Cfr.* Akhil R. Amar, *America’s Constitution: A Biography* 298 (2005).

[5] Nevertheless, a majority of legal scholars support an exclusive reading of the amendment procedure in Article V of the federal Constitution in order to *formally* amend the Constitution. See, e.g., David R. Dow, *The Plain meaning of Article V*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 117 (Sanford Levinson ed., 1995); Henry P. Monaghan, “We the Peoples, Original Understanding, and Constitutional Amendment”, 96 Colum. L. Rev. 121, 127 (1996); Lester B. Orfield, *The Amending of the Federal*

Constitution 39(1942); Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation", 108 Harv. L. Rev. 1221, 1233 (1995); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article. V's Mechanisms*, 21 Cumb. L. Rev. 271 (1991).

[6] Akhil R. Amar, *America's Constitution: A Biography* 292 (2005).

[7] Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1056-1060 (1988) & Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 489-494 (1994) (developing an intra-textual argument based on the Preamble, the First, Ninth, and Tenth Amendments); *Id.*, at 457 and 481-487 (1994) (defending that national popular sovereignty gives the People a legal right to alter the Constitution through a majoritarian and populist mechanism like a national referendum). *Contra* John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article. V's Mechanisms*, 21 Cumb. L. Rev. 271 (1991) (criticizing Akhil R. Amar).

[8] John Joseph Wallis, NBER/University of Maryland State Constitution Project, www.stateconstitutions.umd.edu, last visited on July 4, 2014.

[9] Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237, 265 (Sanford Levinson ed., 1995). *See also* Sanford Levinson, *Our Undemocratic Constitution* 21 and 160-165 (2006).

[10] John J. Dinan, *The American State Constitutional Tradition* 30-31 (2006).

[11] In Delaware, the state legislature on its own can amend the constitution in two consecutive sessions without popular vote (Del. Const. art. XVI, §1.). *See* Gerald Benjamin, *Constitutional Amendment and Revision*, in *State Constitutions For The Twenty-First Century: Volume 3*, 177, 185 (G. Alan Tarr & Robert F. Williams eds., 2006).

[12] Since 2006, Article XI Section 5 of Florida's Constitution requires a supermajority vote of 60% of the people voting on the question for approval of a proposed amendment. In addition, a proposal to introduce a new State tax or fee in Florida via amendment of the state constitution requires the approval by two-thirds of the voters (Fla. Const. art. XI, § 7).

[13] Article 100 of New Hampshire's Constitution requires a positive vote by two-thirds of the voters voting on the amendment.

[14] In Illinois an amendment proposed by the state legislature requires a simple majority of those casting a ballot for any office in that election or a supermajority vote of 60% of the people voting on the question (Ill. Const. art. XIV, § 1.).

[15] Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Mississippi, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *See* K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking*, 63 U. Cin. L. Rev. 1185 (1995).

[16] Arizona, Arkansas, California, Colorado, Michigan, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota.

Voters in Nevada need to approve constitutional amendments by initiative with a simple majority vote in *two* separate elections in order to become part of the state constitution (Nev. Const. art. 19, § 2).

[17] Massachusetts requires a simple majority of the voters voting on the particular amendment in addition to at least 30% of the total number of ballots in the state election (Mass. Const. art. XLVII, IV, § 3-5). Mississippi demands a simple majority of the votes on the particular amendment and at least 40% of the total votes cast at the election (Miss. Const. art. XV, § 273). Nebraska requires a simple majority of the votes cast on the particular amendment and not less than 35% of the total vote cast at the election at which the proposed amendment was submitted (Neb. Const. art. III, § 4).

[18] Fla. Const. art. XI, § 5.

[19] In Illinois, an approval of a proposed amendment can be obtained by 60% of the people voting on the amendment *or* a majority of those voting in the election (Ill. Const. art. XIV, § 3).

[20] California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wisconsin.

In Hawaii, an approval of a proposed amendment or revision can be achieved by a majority vote of at least 50% of all the votes generally cast in the election, or by at least 30% of all the registered voters in the state at the time of the election in case of a special election (Haw. Const. art. XVII, § 2).

[21] Minnesota and Florida.

[22] Alabama, Alaska, Delaware, Kentucky, Maine, Montana, Missouri, Nevada, Ohio, South Carolina, West-Virginia, Washington, Wyoming.

[23] Wallace E. Oates, *An Essay on Fiscal Federalism*, Journal of Economic Literature, 1120, 1123 (1999).

[24] See Lester B. Orfield, The Amending of the Federal Constitution 177-180 (1942) (discussing proposals advocating to allow a proposal of amendments by popular initiative on the federal level and referring to constitutional practice in the states).

[25] See Lester B. Orfield, The Amending of the Federal Constitution 192-203 (1942). *Id.*, at 192: “The chief proposal for the alteration of the amending process to receive serious consideration in the past two decades has been that for a referendum.”

[26] Akhil R. Amar, *America’s Constitution: A Biography* 10-13 and 295-297 (2005) (invoking several important speeches, essays and ratification texts at the Founding of *inter alia* James Wilson, Publius, Alexander Hamilton, and James Iredell).

[27] Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1096 (1988): “the right of a current majority to amend our Constitution may scare you. To be honest, it scares me a little too. However, ... the alternative seems even scarier.”

[28] *Id.* at 1097 (invoking the Federalist Papers).

[29] Bruce A. Ackerman, *We The People: Foundations* 54-55 (1991); Philip J. Weiser, Note, *Ackerman’s Proposal for Popular Constitutional Lawmaking: Can It Realize His Aspirations for Dualist Democracy?*, 68 N.Y.U. L. Rev. 907 (1993) (criticizing Ackerman’s proposal and advocating for deliberation).

[30] The Federalist No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961): “If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times ... to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all.”

[31] Henry P. Monaghan, “We the Peoples, Original Understanding, and Constitutional Amendment”, 96 Colum. L. Rev. 121 (1996) (criticizing Akhil R. Amar by invoking federalist papers of Madison and Hamilton about the role of the states).

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